

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1382

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

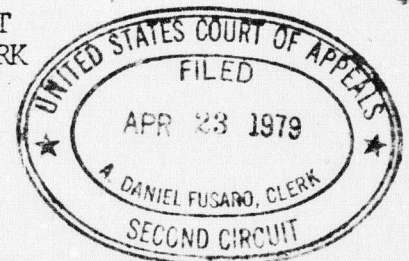
FREDERICK J. MONTELBANO,

Defendant-Appellant.

B
PRS
Docket No. 77-1382

PETITION FOR REHEARING ON BEHALF OF
APPELLANT FREDERICK J. MONTELBANO
WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorney for Appellant MONTELBANO.

JONATHAN J. SILBERMANN,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

FREDERICK J. MONTELBANO,

Defendant-Appellant.

Docket No. 77-1382

PETITION FOR REHEARING ON BEHALF OF
APPELLANT FREDERICK J. MONTELBANO
WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant Frederick J. Montelbano seeks rehearing, with a suggestion for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, from a judgment and opinion of this Court (Lumbard, Feinberg, and Timbers, C.JJ.) entered on April 9, 1979.* The decision affirmed a

*A copy of the opinion of this Court is annexed hereto.

a judgment of the United States District Court for the Southern District of New York (Griesa, D.J.) convicting appellant, after a jury trial, of conspiring to steal an interstate shipment of freight (Count I) (18 U.S.C. §§371, 659), the actual theft of that shipment (Count III) (18 U.S.C. §659), and the obstruction of commerce by robbery (Count II) (18 U.S.C. §1951).

At trial, Ralph Eme, a truck driver employed by O.K. Trucking Company, testified that on December 7, 1976, at approximately 10:30 a.m., he drove a truck filled with frozen seafood to Tenth Avenue and Fourteenth Street in Manhattan, where he stopped at a traffic light (T.26, 28-30, 33*). There, a man, identified at trial as "John Doe," opened the door of the truck and got in, pushing Eme to the passenger's seat. Doe drove the truck a short distance, where Eme was told to get back into the driver's seat, which he did (T.33-34). At Doe's instruction, Eme, who then noticed that the truck was being followed by a red Rambler, drove to the Fulton Fish Market (T.36-39). The driver of the Rambler, described by Eme at trial as 6'1" tall, weighing 160 pounds, with "receding hair, thinning on top," and wearing a peacoat and dungarees (T.39-40), got into the truck and drove to the Babylon area of Long Island (T.38-41, 44). Eme testified that he "believed" that the person who drove the truck

*"T" references in parentheses are to pages of the trial transcript.

to Long Island was appellant, but that he was not certain of his identification ("I can't totally be certain, no") (T.40, 71). During the ride, Eme's glasses were removed and he was told to look "straight through the windshield" (T.41-42, 76-77). Eme saw the Rambler following the truck (T.42).

Eme also testified that at a shopping area in Long Island, he got into the Rambler with Doe and heard the truck leave (T.46). Approximately one-half hour later (T.49), the truck returned and an unidentified person, who had been the passenger in the truck, got into the car and drove to another shopping center (T.50).^{*} According to Eme, appellant there got into the car and drove away, leaving Eme near the Long Island Expressway at about 3:30 p.m. (T.51, 60). Eme then walked to a gas station and telephoned the Nassau County Police (T.60, 87).

Eme further identified photographs of the car used by the hijackers on December 7 (T.47; G.X.9A-P**).

^{*}During this part of the ride, Eme was lying in the back of the car with his face "to the floor" (T.50).

^{**}"G.X." references in parentheses are to numbers of Government exhibits introduced in evidence at trial.

Eme stated that, while lying on the floor of the Rambler, he saw that the mileage on the odometer was "58,000 plus;" that the New York State inspection sticker expired in January, and that wires extended under the dashboard, as did a bracket for a tape player or radio (T.46; 83a-85).

Agnes Pollack testified that she owned the 1969 red Rambler bearing license plate 510 CTF, and identified G.X.9B-E and G.X.9I-L as photographs of the car (T.145-146). Further, Pollack stated that on December 7, 1976, appellant had her car from 3:00 a.m. until his return at approximately 6:00 p.m. (T.148-160).

FBI agent Kosednar identified G.X.9A-E and 9N as photographs of Agnes Pollack's car (T.298-299) and stated that its mileage was 58,400 (T.309).

In addition, Eme testified to his tentative identification of appellant as a result of a line-up held on December 16, 1976 -- nine days after the hijacking (T.62). At that time Eme said that appellant "could possibly be the man but [that he] wasn't totally certain" (T.66).

On cross-examination, Eme indicated that he gave the Nassau County police officer who interviewed him on the day of the hijacking "the best description" he could (T.88-89), telling the officer that the man who drove the truck to Long Island had black hair, was "in his twenties," "tall, slim," and weighed "between 150 and 165 pounds" (T.89-90, 99).*

Prior to the charge, defense counsel requested that Judge Griesa instruct the jurors on the question of identification, and submitted an instruction designed to guide the jurors in their determination (Document #15, Record on Appeal).** Over defense objections (T.279), Judge Griesa refused to give this

*The Government's case also included evidence of a "similar act" and false exculpatory testimony given before the grand jury. See United States v. Montelbano, Docket No. 77-1382, slip op. 5545, 5549-5550 (2d Cir. April 9, 1979).

**Defendant's Request to Charge No. 8 reads as follows:

REQUEST NO. 8
Identification

The evidence in this case raises the question of whether Mr. Montelbano was involved in the alleged hijacking and necessitates your resolving any uncertainty in testimony on that issue.

Testimony that is offered to prove the identity of another must be treated with extreme caution.

[footnote continued]

instruction, stating:

I will not analyze the precise considerations about identification.

(T.279).*

[Footnote continued from the preceding page]

The burden of proof is on the prosecution with reference to every element of the crimes charged and included is the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crimes charged. In appraising the identification testimony of a particular witness, you should take into account the following factors:

1. Was the identification made by the witness after the offense the product of his own recollection? If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize that identification with great care.
2. You may take into consideration the length of time that elapsed between the occurrence of the crime and the next time the witness saw the defendant.
3. You may take into consideration the nature of the witness' description of the accused; for example, was it detailed and accurate, or was it general and vague?
4. You should consider whether the witness was able to make a certain identification or whether he expressed doubts and said he wasn't sure.
5. The credibility of the identification witness should be considered in the same light as any other witness, whether he is truthful, and whether he had the capacity to make a reliable observation on the matter covered by his testimony.

Adapted from Judge Ward's charge in United States v. Charles Morrison, 77 Cr. 348 (RJW).

See United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); United States v. Wilforth, 493 F.2d 730 (3d Cir. 1974).

*The Government argued that an instruction on the credibility of witnesses would be sufficient (T.278).

After explaining the distinction between direct and circumstantial evidence and telling the jurors that they should consider both types of proof in determining appellant's guilt, Judge Griesa instructed the jurors that they "should, of course, consider the direct evidence on the point consisting of Mr. Eme's testimony" (T.412). The district judge did not instruct the jurors as to how they were to consider this identification testimony, simply indicating that the weight to be assigned to each piece of evidence, as well as the proof as a whole, was "up to [the jurors] to decide" (T.412).

As to credibility, Judge Griesa enumerated the following factors for the jurors' consideration: the demeanor and manner of the witness; the inherent believability of the story and how it related to the other evidence in the case; the witness' motive to lie, if any; and prior inconsistent statements (T.421-423).

After deliberations, the jurors found appellant guilty as charged, and this appeal followed. On appeal, appellant claimed, inter alia, that the failure of the district court to instruct the jurors on the question of eyewitness identification testimony was error requiring reversal.

Oral argument of the appeal was heard on February 28, 1978. The decision of this Court (Timbers, C.J.) was rendered April 9, 1979, holding that the failure to give a cautionary instruction, despite a request, was not error. Judge Lumbard concurred in the affirmance of the conviction. Judge Feinberg issued a separate concurring opinion, indicating that a cautionary instruc-

tion on eyewitness identification, while preferred, "is still not the law of this circuit." United States v. Montelbano, slip op. at 5553. Judge Feinberg wrote:

I concur separately, however, because I believe the time has come for this court to give a model instruction for the district courts to use in the future. In this regard, I think the approach followed by the Third, Fourth, Seventh and District of Columbia Circuits is sound. See United States v. Barber, 442 F.2d 517, 525-28 (3d Cir.), cert. denied, 404 U.S. 846, 958 (1971); United States v. Holley, 502 F.2d 273 (4th Cir. 1974); United States v. Hodges, 515 F.2d 650 (7th Cir. 1965); United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). It is my hope that eventually a majority of this court will support the views there expressed.

Id., slip op. at 5553.

REHEARING OR REHEARING EN BANC SHOULD BE GRANTED ON THE QUESTION OF THE NECESSITY OF A JURY INSTRUCTION WITH RESPECT TO EYEWITNESS IDENTIFICATION TESTIMONY.

This case presents this Court with an opportunity to define a model jury instruction required to be given on the issue of eyewitness identification testimony. As long ago as United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972), this Court set forth the district courts' obligation to give proper instructions on this issue:

While a defendant is not entitled to a reading of all that was said about the dangers of misidentification in United States v. Wade, [388 U.S. 218] at 228-236, 87 S.Ct. at 1926, and Simmons v. United States [390 U.S. 377] at 383, 384, 88 S.Ct. at 967, we would think it reasonable that a properly drafted instruction, drawing particularly on Mr. Justice Harlan's language in Simmons, should be given if requested.

Id., 456 F.2d at 643-644.

In Simmons v. United States, 390 U.S. 377, 383 (1968), Mr. Justice Harlan wrote:

... Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification.... Regardless of how the initial identification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than the person actually seen, reducing the trustworthiness of the subsequent lineup or courtroom identification.

The fallibility of eyewitness identification is succinctly described in the often-quoted statement of Felix Frankfurter's

in a book on the Sacco-Vanzetti case:

What is the worth of identification testimony, even if uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established in a formidable number of instances in the records of English and American trials.

THE CASE OF SACCO-VANZETTI,
30 (1927).

See United States v. Wade, 388 U.S. 218, 228 (1967), Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, 6 (1965). Furthermore, the problems arising from eyewitness identification are not rectified by counsel's cross-examination or by an instruction on credibility; this is so because the critical question is not the bias or interest of the witness, but rather the limitations on human perception and memory generally. As Wall notes:

... [C]ases of mistaken identity are surprisingly frequent. The cause of this apparent anomaly is the fact that the normal person sees but a few of someone else's distinguishing characteristics, retains even fewer in his mind, and is able to revive fewer still when asked to describe the person observed or to identify one thought to be the same. If the characteristics of the person to be identified are similar to the characteristics of the person originally observed as they now exist in the mind of the witness, the witness may very well recognize them, and make an erroneous identification....

Id. at 10.

The Seventh Circuit explained:

Since it is our goal to guard against the occurrence of [the] injustice [of mistaken identification], we are convinced that neither the

summation of counsel at the close of the evidence ... nor cross-examination as to the matter of identification by defense counsel adequately protects a defendant against the dangers of misidentification which are inherent in eye-witness testimony. Nor do we believe that such summation and cross-examination by counsel may substitute for proper instructions to the jury by the court.

United States v. Hodges, 515
F.2d 650, 653 (7th Cir. 1975).

Because "[t]he vagaries of eye-witness identification are well known" (United States v. Wade, supra, 388 U.S. at 228) to both jurists and lawyers alike, and because, on the other hand, juries of laymen are likely to be inappropriately and unduly receptive to eyewitness testimony (Wall, supra, at 19-23),* there is a growing trend in the various courts of appeals to require that the jury be equipped with a proper awareness of the problem.

Consequently, the Third, Fourth, Seventh, and District of Columbia Circuits have required that an instruction on the question of identification be given. United States v. Barber, 442 F.2d 517, 528 (3d Cir.), cert. denied, 404 U.S. 958 (1971) (prospective application only); United States v. Holley, 502 F.2d 273, 277 (4th Cir. 1974) (reversal required because "the charge to the jury on the question of identification [was] insufficient"); United States v. Hodges, supra, 515 F.2d at 653 (reversal because of failure to give appropriate instructions); United States v.

*Wall categorizes the absence of a "healthy skepticism" on the part of jurors as the factor most aggravating the problem. Wall, supra, at 19.

Telfaire, 469 F.2d 553 (D.C. Cir. 1972); Macklin v. United States, 409 F.2d 174 (D.C. Cir. 1969); see also United States v. Dodge, 538 F.2d 770, 684 (8th Cir. 1966) ("[W]e will view with grave concern the failure to give specific and detailed instructions on identification in future cases where identification of the defendant is based solely or substantially on eye-witness testimony"); compare United States v. Kavanagh, 572 F.2d 9, 11-12 (1st Cir. 1978); United States v. Collins, 559 F.2d 561, 566 (9th Cir.), cert. denied, 434 U.S. 907 (1977); United States v. Masterson, 529 F.2d 30, 32 (9th Cir.), cert. denied, 426 U.S. 908 (1976).

Ignoring this Court's long-standing admonition as to the importance of a proper jury charge on eyewitness identification, United States v. Fernandez, supra, the district court here did not give any instruction whatever on that specific issue. Indeed, Judge Griesa told the jurors to "consider the direct evidence on the point [of guilt] consisting of Mr. Eme's testimony" (T.412), without cautioning them about the difficulties of eyewitness testimony and the possibility of honest mistake, or indicating the factors which they should consider for a fair determination of the question.

The adoption of a cautionary instruction on eyewitness identification, as suggested in Judge Feinberg's concurring opinion, would clearly help eliminate any miscarriages of justice caused by the "awful possibility" of mistaken identification. See United States v. Evans, 424 F.2d 1178 (2d Cir. 1973),

and Brathwaite v. Manson, 527 F.2d 363, 369 (2d Cir. 1975),
reversed, 432 U.S. 98 (1977). Because of the importance of
this question to the accurate determination of guilt or in-
nocence, rehearing or rehearing en banc should be granted.

CONCLUSION

For the foregoing reasons, the judgment of the panel of
this Court entered in this case on April 9, 1979, should be
reconsidered, and rehearing or rehearing en banc should be
granted.

Respectfully submitted,

THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
531 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

Attorney for Appellant MONTELEANO.

JONATHAN J. SILBERMANN,
Of Counsel.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—♦—
No. 703—September Term, 1977.

(Argued February 28, 1978 Decided April 9, 1979.)

Docket No. 77-1382

—♦—
UNITED STATES OF AMERICA,

Appellee,

—v.—

FREDERICK J. MONTELBANO,

Appellant.

—♦—
Before:

LUMBARD, FEINBERG and TIMBERS,

Circuit Judges.

—♦—
Appeal from a judgment entered after a four day jury trial in the Southern District of New York, Thomas P. Griesa, *District Judge*, convicting appellant of violating certain provisions of federal law stemming from his participation in the hijacking of a truckload of seafood.

Affirmed.

—♦—
JONATHAN J. SILBERMANN, New York, N.Y. (Martin Erdmann, Federal Defender Services Unit, The Legal Aid Society, New York, N.Y., on the brief), *for appellant.*

JOHN S. SIFFERT, Asst. U.S. Atty., New York,
N.Y. (Robert B. Fiske, Jr., U.S. Atty., and
Richard Weinberg, Asst. U.S. Atty., New
York, N.Y., on the brief), for appellee.

TIMBERS, *Circuit Judge*:

On this appeal from a judgment entered after a four day jury trial in the Southern District of New York, Thomas P. Griesa, *District Judge*, convicting appellant of violating certain provisions of federal law stemming from his participation in the hijacking of a truckload of seafood,¹ the principal issue is whether the district court erred in declining to give a requested cautionary instruction concerning the reliability of eyewitness identification testimony. We hold that the district court did not err in declining to give the instruction in the instant case. We affirm the conviction.

I.

The events which culminated in the hijacking began during the early morning hours of December 6, 1976. At 5 A.M., the O.K. Trucking Company dispatched one of its drivers, Ralph Eme, age 19, in a refrigerated truck from Philadelphia to pick up frozen seafood from two refrigerated warehouses in Jersey City and from one in New York City. Eme did so.

¹ Montelbano was convicted of conspiring to steal goods from interstate commerce, 18 U.S.C. §§659 and 371 (1976) (Count One); of obstructing interstate commerce by the use of threats in violation of the Hobbs Act, and conspiring to do so, 18 U.S.C. §§1951 and 371 (1976) (Count Two); and of stealing goods from interstate commerce, 18 U.S.C. §659 (1976) (Count Three).

After loading his truck with substantial amounts of seafood² at the three warehouses, Eme was directed to proceed to a fourth warehouse in Manhattan to assist other O.K. Trucking drivers by taking on overflow from their trucks before Eme returned to Philadelphia. It was while Eme was en route to the fourth warehouse in Manhattan that the hijacking occurred.

At about 10:30 A.M., while driving south on Tenth Avenue, Eme stopped for a red light at the intersection of Tenth Avenue and 14th Street. A man forced his way into the driver's side of the truck and shoved Eme over to the passenger's side. This unidentified hijacker (referred to as "Doe" in the indictment and at trial) drove the truck around the corner and stopped on 14th Street. Doe ordered Eme to climb over to the driver's side and to drive the truck south on West Street until he came to the waterfront where he was ordered to stop. Eme did so.

The truck was being followed by a red Rambler. When the truck stopped at the waterfront, the Rambler did also. A man Eme later identified as Montelbano and another unknown man (referred to as "Roe") got out of the Rambler and walked to the passenger's side of the truck. Montelbano instructed Doe, who was seated on the passenger's side of the truck, to tell Eme to do as he was told or his brains would be blown out. Eme heard what was said. Montelbano returned to the Rambler. Doe, who remained on the passenger's side, directed Eme to drive to the Fulton Fish Market. He did so. The truck and the Rambler both stopped at the Fulton Fish Market.

Montelbano got out of the Rambler at the Fulton Fish Market. He forced his way into the driver's side of the

² The truckload of seafood consisted of 11,000 pounds of lobster tails, shrimp and crab meat valued in excess of \$32,000 wholesale.

truck, shoving Eme from the driver's side toward the passenger's side and sandwiching him between Montelbano and Doe. Montelbano drove the truck from the Fulton Fish Market, out of Manhattan, and onto the Long Island Expressway. Roe followed in the Rambler.

During this trip Montelbano told Eme to take off his glasses, to look straight ahead, and to follow instructions or his brains would be blown out. Eventually Montelbano left the Expressway, stopped at a gas station, and made a phone call. Upon returning to the truck, Montelbano drove for another fifteen to twenty minutes before stopping in the Babylon area of Long Island. There the Rambler also stopped. Montelbano got out, walked behind the truck and spoke with Roe who had gotten out of the Rambler. Montelbano then returned to the truck and drove it into a shopping center.

At the shopping center, Montelbano ordered Eme out of the truck and into the Rambler where he remained with Doe. Montelbano, accompanied by Roe, then drove the truck away to dispose of the cargo of seafood. They returned forty minutes later with the empty truck.

Montelbano then drove the truck to another shopping center, followed by the Rambler which was driven by Roe. On this trip Eme was forced by Roe to lie face down on the back seat of the Rambler.

At this second shopping center, Montelbano abandoned the empty truck. He took over the driver's seat of the Rambler and, accompanied by Doe, Roe and Eme, drove around that area of Long Island for a short while. Roe took Eme's driver's license from him and warned him that, if any of the men were caught, someone would come to his address and get him.

Eventually Montelbano released Eme and instructed him to walk straight away from the car without turning back.

Shortly before 3:30 P.M., Eme called the police from a gas station near the Long Island Expressway and reported the hijacking. Five hours had elapsed since the truck was first seized in Manhattan. The cargo of seafood never was recovered. The empty truck, as stated above, was abandoned at the second of the two shopping centers to which it had been driven.

II.

In due course Montelbano was arrested and an indictment was returned on March 15, 1977 charging him with the offenses stated above. See note 1 *supra*. At his trial which began August 1, 1977, the government called nine witnesses and produced twenty-four exhibits. The government's case consisted of eyewitness identification of Montelbano, circumstantial evidence, false exculpatory evidence, and prior similar act evidence.

Eme's eyewitness identification of Montelbano was based on his close, unobstructed view of defendant at frequent intervals during the five hour period of the hijacking. Nine days after the hijacking Eme picked Montelbano out of a lineup at FBI headquarters. Eme said Montelbano "looked similar", but added that he was not certain that he was the participant in the hijacking. Eme also identified Montelbano at trial, stating, "I believe it is the man sitting at the table." On cross-examination, defense counsel asked Eme if he meant, when he viewed the lineup, that Montelbano "could have been" one of the men involved in the hijacking. Eme replied that "at the time of the lineup, I believed Mr. Montelbano was the man" Both eyewitness identifications were admitted in evidence.

The government's circumstantial evidence related chiefly to Montelbano's access to the red Rambler and its whereabouts on December 7, the day of the hijacking. Agnes

Pollack, Montelbano's girlfriend with whom he was living, testified at the trial that the 1969 Rambler belonged to her, that Montelbano had ready access to it, that he used it whenever he pleased, and that he had used it on the day of the hijacking. Montelbano testified before the grand jury that he had used the Rambler on the day of the hijacking.

Although Montelbano did not testify at the trial, as stated below, he did give false exculpatory testimony before the grand jury that he had used the Rambler to get to work at the Fulton Fish Market on the morning of December 7; that at about 1 P.M. that day he had driven the Rambler to a bar in the vicinity of Tenth Avenue and 14th Street where he remained for a half hour; and that on the same day he had driven the Rambler to his ailing mother's home in Brooklyn where he visited her from 2 P.M. until dinner time. Montelbano's father testified at the trial that he and his wife (Montelbano's mother) had been away from their home on December 7 from 10 A.M. to 4 P.M., and that they had not seen Montelbano during that time. Before the grand jury, moreover, Montelbano was unable to identify any person he had met at the Fulton Fish Market that morning; nor was he able to identify the bar he had visited in the vicinity of Tenth Avenue and 14th Street.

The government also adduced prior similar act evidence that on September 29, 1976—less than three months before the December 7 hijacking—Montelbano had been caught burglarizing seafood from Fiore Brothers in Nassau County. State charges arising from the Fiore Brothers burglary were pending against Montelbano at the time of the instant trial.³ As he did on December 7, Montelbano

³ He later pleaded guilty to the count in the state court indictment which charged him with attempted burglary in the third degree arising from the Fiore Brothers theft.

on September 29 made use of two accomplices; and he drove another car owned by Agnes Pollack, a 1967 Oldsmobile. Both thefts involved large quantities of seafood—a perishable commodity not easily disposed of in bulk.

Montelbano did not testify at the trial and he called no witnesses.

After a four day trial, the jury returned a verdict on August 4, 1977 convicting Montelbano on each of the three counts of the indictment. On September 7, 1977, Judge Griesa sentenced him to five years imprisonment on each count, but ordered that the sentences be served concurrently. Bail having been denied after his conviction by the district court and by this Court, Montelbano has been serving his sentence.

III.

In the light of these facts and prior proceedings, we turn directly to what we find to be the principal issue in the case, namely, whether the district court erred in declining to give, as requested, a cautionary instruction concerning the reliability of the eyewitness identification testimony. We hold, under the circumstances of this case, that it was not error.

We need hardly look further than Judge Friendly's opinion of two Terms ago in *United States v. Marchand*, 564 F.2d 983, 997 (2 Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978), to sustain the district court's refusal to give the requested cautionary instruction in the instant case. *Marchand* is in accord with other recent decisions in this Circuit. See, e.g., *United States v. Gentile*, 530 F.2d 461, 469 (2 Cir.), *cert. denied*, 426 U.S. 936 (1975); *United States v. Evans*, 484 F.2d 1178, 1187-88 (2 Cir. 1973); *United States v. Fernandez*, 456 F.2d 638, 643-44 (2 Cir. 1972).

As with *Marchand, supra*, 564 F.2d at 985, this is not a case involving "dubious identifications". While Eme technically was a victim of the crime, *id.* at 986, his identification of Montelbano was based on close observation of him over a five hour period on the day of the hijacking. Eme sat next to Montelbano in both the truck and the Rambler for long intervals. Montelbano was in no way disguised, nor was Eme's view obstructed. Eme's observation was such that he was able to identify Montelbano twice after the hijacking—once nine days later at FBI headquarters and again at trial. Despite the wide scope of cross-examination accorded to defense counsel, Eme's identification of Montelbano was never significantly undermined.

Moreover, as in *Marchand, supra*, 564 F.2d at 997, the conviction here did not rest alone on eyewitness identification testimony. As stated above, there was unusually probative circumstantial evidence, false exculpatory evidence indicating consciousness of guilt, and prior similar act evidence. In short, aside from the identification testimony, the government's case was an overwhelming one. Indeed, on appeal appellant does not challenge the sufficiency of the evidence.

Although the district court declined to charge, as requested by appellant, concerning the reliability of eyewitness identification testimony, the court did give the usual instructions regarding the credibility of witnesses.

We hold on the facts of this case, and particularly in the light of our recent holding in *Marchand*, that failure to give the requested cautionary instruction was not error.

We have carefully considered appellant's other claims of error and we find them to be without merit.

Affirmed.

LUMBARD, *Circuit Judge* (concurring):

I concur in the affirmance of the conviction.

FEINBERG, *Circuit Judge* (concurring):

I concur in the result of Judge Timbers's opinion. Despite the relative frequency with which this court has indicated a preference for a cautionary instruction on eyewitness identification, see *United States v. Lewis*, 565 F.2d 1248, 1253 (2d Cir. 1977), cert. denied, 435 U.S. 973 (1978); *United States v. Gentile*, 530 F.2d 461 (2d Cir.), cert. denied, 426 U.S. 936 (1976); *United States v. Fernandez*, 456 F.2d 638, 643-44 (2d Cir. 1972), the charge is still not required under the law of this circuit. Thus the failure to give it in this case is not reversible error.

I concur separately, however, because I believe the time has come for this court to give a model instruction for the district courts to use in the future. In this regard, I think the approach followed by the Third, Fourth, Seventh and District of Columbia Circuits is sound. See *United States v. Barber*, 442 F.2d 517, 525-28 (3d Cir.), cert. denied, 404 U.S. 846, 958 (1971); *United States v. Holley*, 502 F.2d 273 (4th Cir. 1974); *United States v. Hodges*, 515 F.2d 650 (7th Cir. 1975); *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). It is my hope that eventually a majority of this court will support the views there expressed.

CERTIFICATE OF SERVICE

April 23, 1979

I certify that a copy of this rehearing petition has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Silberman